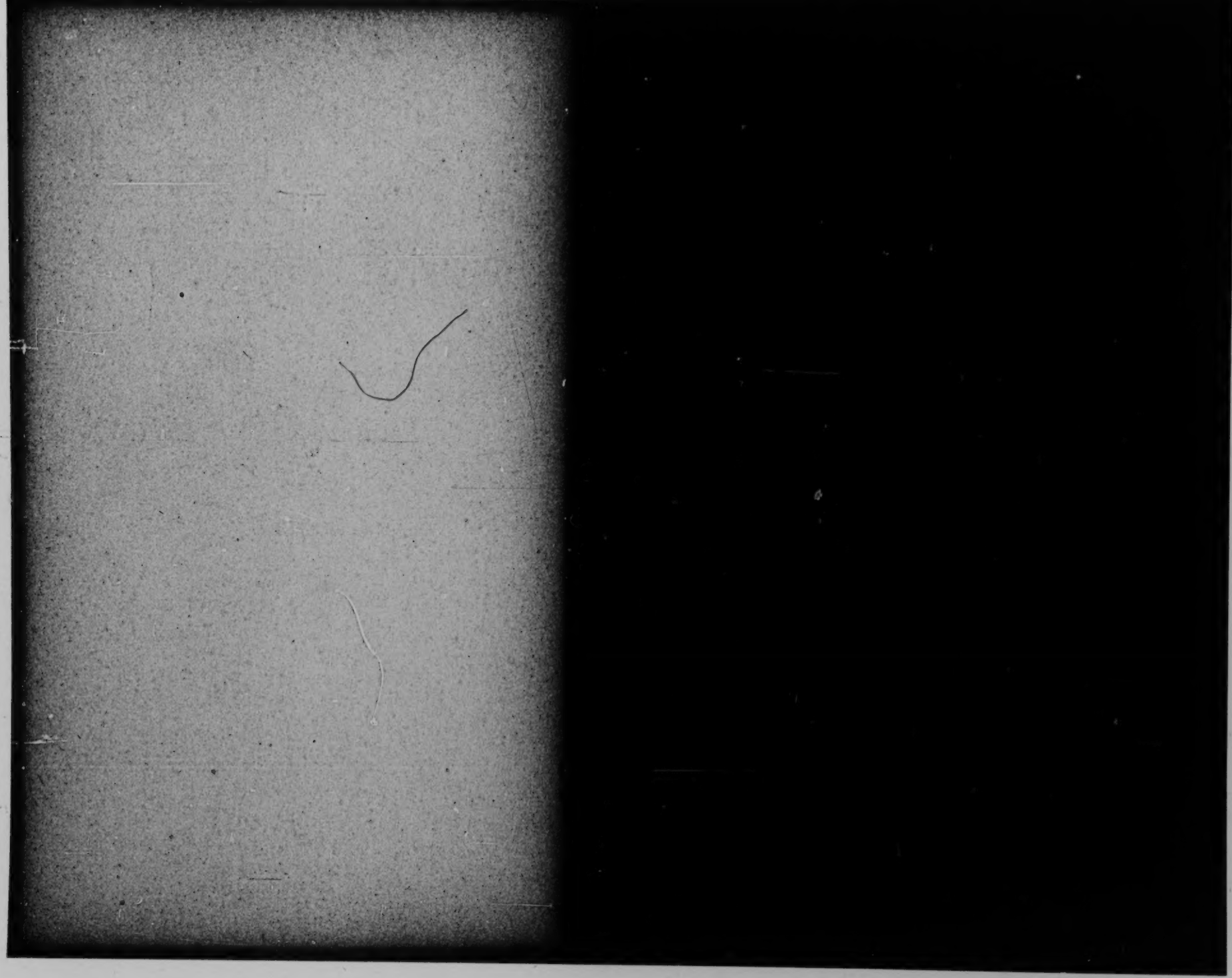

Page

TABLE OF CONTENTS

MOTION OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* 1

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 5

ARGUMENT

I. This Case Involves Public Policies of the Highest Priority 6

II. Even if Congress had been Silent on the Question of Remedies, Well-established Principles Require That the Victims Of Employment Discrimination be Restored to the Position They Would Have Occupied had the Wrong not been Committed. 8

A. Equitable Discretion Must be Affirmatively Exercised to Provide Complete Relief for Wrongs Committed. 8

B. The "Complete Justice" Principle is Equally Applicable in Race Discrimination Cases. 13

III. Neither the Language nor the Background of the Statute Support an Inference that Congress Intended to Provide Title VII Plaintiffs with Less Than a Full Measure of Relief. 18

IV. Back Pay is Essential to Effective Enforcement of Title VII; the Special Circumstances Which Might Justify More Limited Relief Must be Narrowly Circumscribed 21

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases:

Bell v. Hood, 327 U.S. 678 (1946) 9

Bemis Bros. Bag Co. v. United States, 289 U.S. 28 (1933) 13, 24

Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946) 12

Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) 9

Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969) 19, 21, 22

Bradley v. School Bd. of City of Richmond, 416 U.S. 696 (1974) 16

Brown v. Board of Educ., 347 U.S. 483 (1954) 6

Brown v. Swann, 10 Pet. (U.S.) 497 (1836) 13, 26

Carr v. Conoco Plastics, 423 F.2d 57 (5th Cir. 1970) cert. denied, 400 U.S. 951 (1970) 2

Columbia Nastic & Carter Claibone v. Columbia R. & C. Mfg. Co., 367 F.2d 308 (2d Cir. 1966) 24

Consolo v. Federal Maritime Comm'n, 383 U.S. 607 (1966) 23, 24, 25

Culpepper v. Reynolds Metals Co., 421 F.2d 888 (5th Cir. 1970) 7, 21

Davis v. Board of School Comm'rs, 402 U.S. 33 (1971) 14

Duhon v. Goodyear Tire & Rubber Co., 494 F.2d 817 (5th Cir. 1974) 21

Douglas v. Hampton, ___ F.2d ___, No. 72-1376 (D.C. Cir. Feb. 27, 1975) 2

Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co., 255 F.2d 518 (3d Cir. 1958) 24

Ford Motor Co. v. United States, 405 U.S. 562 (1972) 11

Cases, continued: Page

Golden State Bottling Co. v. NLRB, 414 U.S. 160 (1974) 20

Green v. County School Bd., 391 U.S. 430 (1968) 14

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 2, 6, 23

Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973) 20

Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) 6

Hecht Co. v. Bowles, 321 U.S. 321 (1944) 10, 12

International Salt Co. v. United States, 332 U.S. 392 (1947) 11

J.I. Case Co. v. Borak, 377 U.S. 426 (1964) 9, 10, 12

Johnson v. Georgia Highway Express Co., 417 F.2d 1122 (5th Cir. 1969) 21

Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974) 21

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) 6, 14, 15

Kansas City - St. Louis & C.R. Co. v. Alton R. Co., 124 F.2d 780 (7th Cir. 1941) 24

Kober v. Westinghouse, 480 F.2d 240 (3d Cir. 1973) 23

Langnes v. Green, 282 U.S. 531 (1931) 12

LeBlanc v. Southern Bell Co., 460 F.2d 1228 (5th Cir. 1972), *cert. denied*, 409 U.S. 990 (1972) 23

Louisiana v. United States, 380 U.S. 145 (1965) 15

Manning v. General Motors Co., 466 F.2d 812 (6th Cir. 1972) 23

Marbury v. Madison, 1 Cranch (U.S.) 137 (1803) 8

McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) 20

Meadows v. Ford Motor Co., — F.2d —, 9 FEP Cases 180 (6th Cir. 1975) 20, 21

Cases, continued: Page

Mitchell v. DeMario Jewelry, 361 U.S. 288 (1960) 9, 10, 11, 12, 20

Moragne v. States Marine Lines, 398 U.S. 375 (1970) 9, 17, 21

Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974), *cert. denied*, ___ U.S. ___, (1974) 2

Nathanson v. NLRB, 344 U.S. 25 (1952) 20

Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) 15

NLRB v. H.N. Thayer Corp., 213 F.2d 748 (1st Cir. 1954), *cert. denied*, 348 U.S. 883 (1954) 19

NLRB v. Mastro Plastics Corp., 354 F.2d 170 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966) 19, 20

NLRB v. Rutter Rex Mfg. Co., 396 U.S. 258 (1969) 20, 25

Northcross v. Board of Educ., 412 U.S. 426 (1973) 16

Oatis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968) 22

Palmer v. Thompson, 403 U.S. 217 (1971) 24

Pennsylvania Greyhound Lines, Inc., 1 NLRB 1 (1935) *enf'd. sub. nom*, NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261 (1938) 19, 20

Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) 21

Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) 19, 20

Porter v. Warner Holding Co., 328 U.S. 395 (1946) 9, 10, 12, 13, 17

Robinson v. Lorillard Co., 444 F.2d 791 (4th Cir. 1971) 19, 20

Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970) 22

Cases, continued: Page

Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972) 23

Shultz v. Mistletoe Express Service, Inc., 434 F.2d 1267 (10th Cir. 1970) 20

Shultz v. Parke, 413 F.2d 1364 (5th Cir, 1969) 20

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 6

Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944) 10, 13

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931) 12

Sullivan v. Little Hunting Park, 396 U.S. 229 (1969). 15

Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) 14

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 9, 10

Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944) 10, 13

United States v. DuPont & Co., 366 U.S. 316 (1961) 11

United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973) 21

United States v. Masonry Contractors, 494 F.2d 870 (6th Cir. 1974) 21

United States v. Morgan, 307 U.S. 183 (1939) 8, 10

United States v. United States Gypsum, 340 U.S. 76 (1950) 11

Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515 (1937) 9, 10

Watson v. City of Memphis, 373 U.S. 526 (1963). 6, 23

White v. Regester, 412 U.S. 755 (1973) 6

Wicker v. Hoppock, 6 Wall. (U.S.) 94 (1867). 13

Cases, continued: Page

Wirtz v. Atlas Roofing Mfg. Co., 377 F.2d 112 (5th Cir. 1967) 20

Wirtz v. Malthor, Inc., 391 F.2d 1 (9th Cir. 1968) 20

Wright v. Council of City of Emporia, 407 U.S. 451 (1972) 14, 23

Young v. International Telephone & Telegraph Co., 438 F.2d 757 (3d Cir. 1971) 2

Statutes and Regulations:

20 U.S.C. §160 19

20 U.S.C. §217 20

20 U.S.C. §1617 16

42 U.S.C. §§1971 *et seq* 6

42 U.S.C. §1982 15

42 U.S.C. §1988 15

42 U.S.C. §2000a-3(b) 6, 15

42 U.S.C. §§2000e *et seq* 2, 6

42 U.S.C. §2000e-5(g) 3, 4, 5, 18

42 U.S.C. §2000e-12(b) 23

42 U.S.C. §§3601 *et seq* 6

Fed. R. Civ. P. 23, 54(c) 21, 24

Supreme Court Rule 42(2) 1

Congressional Authorities:

118 Cong. Rec. 7168 (1972) 19

113 Cong. Rec. 2298-2302, 1861-1864 19

110 Cong. Rec. 7212-15, 6549 (1964) 19

Legislative History of the Equal Employment Opportunity Act of 1972, 92d Cong., 2d Sess. at 1406, 1407 (Comm. Print. 1972) 22

Congressional Authorities, continued: Page

Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act, U.S. Dept. of Labor Employment Standards Administration, An Economics Effect Study Submitted to Congress, 13-14 (1975) 22

Hearings on H.R. 15826 before Subcommittee on Equal Opportunities of the House Committee on Education and Labor, 93d Cong., 2d Sess., at 279, 290 (1975) 23

Other Authorities:

1 Pomeroy, Equity Jurisprudence §62 (3d ed. 1905) 8

F. Maitland, Equity Vol. 1-11 (2d ed. 1936) 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-389

ALBEMARLE PAPER COMPANY, et al.,

Petitioners,

v.

JOSEPH P. MOODY, et al.,

Respondents.

No. 74-428

HALIFAX LOCAL NO. 425,
UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO,

Petitioners,

v.

JOSEPH P. MOODY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law hereby moves, pursuant to Rule 42(2) of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. The petitioners have refused their consent to the filing of this brief. Respondents have consented to its filing.

As more fully set forth in the brief (at 2, *infra*), the Committee has entered into a contract with the Equal Employment Opportunity Commission, under which the Committee is responsible for providing legal services to those who seek relief from employment discrimination. Moreover, the Committee is otherwise significantly involved in the national effort to eliminate discrimination and its effects from public and private employment. The questions presented in this case as to the appropriate standards for awarding back pay under Title VII of the Civil Rights Act of 1964 are of immediate and vital concern to the Committee and those to whom it provides legal assistance. The positions taken by petitioners involve remedial policies of general applicability to civil rights litigation. The implications of those positions may not be fully briefed by the immediate litigants, and yet may have direct and important consequences for the disposition of numerous other cases.

Respectfully submitted,

RICHARD F. BABCOCK
WILLIAM H. BROWN, III
LLOYD N. CUTLER
ERWIN D. GRISWOLD
Lawyers Committee For Civil Rights Under Law

J. HAROLD FLANNERY
PAUL R. DIMOND
WILLIAM E. CALDWELL
LINDA E. PERLE
ROBERT B. WALLACE
520 Woodward Building
Washington, D.C. 20005
Attorneys for Amicus Curiae.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-389

ALBEMARLE PAPER COMPANY, et al.,

Petitioners,

v.

JOSEPH P. MOODY, et al.,

Respondents.

No. 74-428

HALIFAX LOCAL NO. 425,
UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO,

Petitioners,

v.

JOSEPH P. MOODY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE*

The Lawyers' Committee for Civil Rights Under Law was organized in June 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure equal civil rights for all Americans through the legal process. The Committee's membership includes three former Attorneys General, thirteen past Presidents

of the American Bar Association, two former Solicitors General, a number of law school deans, and many of the nation's leading lawyers. Pursuant to a contract with the Equal Employment Opportunity Commission, the Lawyers' Committee has since 1971 assisted the private bar in five cities in litigation under Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. §§2000e *et seq.*), on behalf of injured individuals and class members unable to secure relief through the EEOC. In addition, the Lawyers' Committee, its Government Employment Project, its local committees, affiliates, and volunteer lawyers are actively engaged in providing legal representation to the victims of racially discriminatory employment practices in a wide range of other cases. *E.g., Morrow v. Crisler*, 491 F.2d 1053 (5th Cir.), *cert. denied*, ___U.S.___ (1974); *Carr v. Conoco Plastics*, 432 F.2d 57 (5th Cir.), *cert. denied*, 400 U.S. 951 (1970); *Young v. International Telephone & Telegraph Co.*, 438 F.2d 757 (3d Cir. 1971); *Douglas v. Hampton*, ___F.2d___, No. 72-1376 (D.C. Cir., Feb. 27, 1975).

Amicus is troubled by the position advanced in this case by the Company and Union petitioners as to the circumstances under which district courts should award back pay to minority citizens to reimburse them for wages lost as a result of racially discriminatory practices.[1] The clear import of petitioners' argument regard-

[1] This case also involves an issue as to the validity of ability testing devices utilized by the Company petitioners for employment and job assignment purposes. Our review of the record convinces us that the Court is not likely to accept the invitation of the Company and an *amicus* to withdraw from the landmark decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). We therefore confine this brief to the back-pay questions, on which the Court has not previously spoken.

ing the back-pay issue—that the back-pay standard adopted by the Court of Appeals is in conflict with the "traditional equitable discretion" accorded district courts with respect to matters of relief—is that the remedial powers of federal district courts, when exercised in a manner which accords less than complete relief, are not subject to appellate intervention except upon a finding that the district court has grossly abused its discretion. Petitioners argue that since the back-pay provision of Title VII, 42 U.S.C. §200e-5(g), was designed to invest district judges with "traditional equitable discretion," it necessarily follows that an appellate guideline which requires full relief in the absence of injustice to the losing party is an impermissible encroachment upon the trial court's authority.

Petitioners' position is without merit. It is directly contrary to the established remedial principle that, unless there are compelling circumstances amounting to manifest injustice to the wrongdoer, legal wrongs do not go without a complete remedy. Petitioners' argument is also inconsistent with Congress' purposes in adopting Title VII. If petitioners' contentions were sustained, the national effort to eradicate racial discrimination in employment would be impeded. This brief is filed by the Committee as a friend of the Court to urge affirmance of the opinion and decision below. Strong considerations of national policy demand that this Court adhere to a standard of "complete justice" to govern the award of back pay in employment discrimination cases.[1]

STATEMENT OF THE CASE

In this Title VII class action the District Court held that the Company and Union petitioners had engaged and were engaging in racially discriminatory employment practices that have consigned black workers to less-desirable, lower-paying jobs, and assured white employees more desirable and better-paying jobs. (A. 474-507.) Despite the wages concededly lost by the black victims as a result of petitioners' discriminatory practices, the District Court refused to make them whole through an award of back pay.[2] The court offered two reasons for this anomalous result: first, it held that petitioners' racial employment practices were not the product of subjective "bad faith"; and second, it speculated that petitioners "might have chosen to exercise unusual zeal in having this [district] court determine their rights . . ." had they known of the back-pay claim earlier than a year prior to trial. (A. 498.)

The Court of Appeals reversed the trial court's refusal to award back pay. It held that the innocent victims of unlawful employment discrimination "should ordinarily be awarded back pay unless special circumstances would render such an award unjust" (A. 523-24), but admonished that "a back pay award is limited to damages which are actually suffered." (A. 524.)

---

[2] Section 706(g) of Title VII, 42 U.S.C. §2000e-5(g), which authorizes the back-pay remedy, reads in relevant part as follows:

> If the court finds that the respondent has engaged in or is intentionally engaging in an unlawful employment practice . . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative relief as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . . .

SUMMARY OF ARGUMENT

This case involves important public and congressional policies relating to the elimination of racial discrimination. The resolution of this case may substantially influence the effectiveness with which Congress' policies regarding employment discrimination may henceforth be implemented. Unless the principles applied by the Court of Appeals are adhered to by this Court, the strong national policies against employment discrimination may be impeded and frustrated.

Well-established legal and equitable principles require that one who suffers unlawful injury should be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed, unless there is a clear and valid legislative command requiring a less complete remedy. Accordingly, even without the authorization of back pay contained in Section 706(g) of Title VII, federal law imposes a "complete relief" standard.

Nothing in the language of Title VII or in its legislative history indicates that Congress intended the victims of employment discrimination to be made less than whole. To the contrary, the background of Title VII, including congressional awareness of administrative and judicial implementation of other labor legislation, demonstrates that Congress expected the courts to accord each such victim a full measure of relief.

A judicial standard requiring back pay to be awarded in the absence of injustice is essential for the achievement of the purposes of Title VII. If there are "special circumstances" in which back pay need not be awarded, such circumstances must be narrowly confined and carefully defined.

ARGUMENT

I.

THIS CASE INVOLVES PUBLIC POLICIES OF THE HIGHEST PRIORITY.

In the post-*Brown*[3] era this nation, by conscious legislative and judicial decision, has rededicated itself to the goals of the Reconstruction Amendments to the Constitution. We have pledged to wipe out segregated schooling and its deleterious effects.[4] We have enjoined the maintenance of racially separate municipal parks and recreational facilities,[5] as well as racial discrimination in public accommodations.[6] We have taken major steps to ensure access to the political process free of race-based stumbling blocks.[7] We have decreed for black citizens "the freedom to buy whatever a white man can buy, the right to live wherever a white man can live."[8] And, with particular relevance to this case, we have demanded the elimination of racial discrimination in the terms and conditions of public and private employment.[9] As Judge Tuttle has said:

---

[3] *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

[4] *Brown v. Board of Educ., supra.*

[5] *Watson v. City of Memphis*, 373 U.S. 526 (1963).

[6] Title II of the Civil Rights Act of 1964, 42 U.S.C. §§2000a *et seq.*; *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

[7] Voting Rights Act of 1965, 42 U.S.C. §§1971 *et seq.*; *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *White v. Regester*, 412 U.S. 755 (1973).

[8] *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968); Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§3601 *et seq.*

[9] Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§2000e *et seq.*; *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

> Racial discrimination in employment is one of the most deplorable forms of discrimination known to our society, for it deals not with just an individual's sharing in the "outer benefits" of being an American citizen, but rather the ability to provide decently for one's family in a job or profession for which he qualifies and chooses. *Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970).

Petitioners' effort to describe this case as one unrelated to the public interest is obviously without foundation. Company Brief at 55. The Court of Appeals' directive that back pay should be awarded is not in any sense a windfall to respondents and their class. Those black citizens who have suffered diminished opportunities as a result of racial discrimination cannot obtain adequate restitution from a decree that belatedly permits them merely to transfer or move into a job for which they have long been qualified. Such relief is, to be sure, a necessary and long-overdue ingredient of an effective remedy, but it is nonetheless plainly inadequate. The public interest is not well served if the black victims of employment discrimination, who have been deprived of "the freedom to buy whatever a white man can buy," are not awarded the full economic benefits which they have lost solely because of their race. Urgent national policies are at the heart of the back-pay issue.

II.

EVEN IF CONGRESS HAD BEEN SILENT ON THE QUESTION OF REMEDIES, WELL-ESTABLISHED PRINCIPLES REQUIRE THAT THE VICTIMS OF EMPLOYMENT DISCRIMINATION BE RESTORED TO THE POSITION THEY WOULD HAVE OCCUPIED HAD THE WRONG NOT BEEN COMMITTED.

A. Equitable Discretion Must be Affirmatively Exercised to Provide Complete Relief for Wrongs Committed.

Equity came into existence "as an ameliorating system of justice"[10] in response to "the omissions of the common law, the injustice of many of its rules, and its inability from its modes of procedure, to grant the variety of remedies adequate to the wants of society and the demands of justice. . . ." 1 Pomeroy, *Equity Jurisprudence* §62 (3d ed. 1905). *See generally* F. Maitland, *Equity* 1-11 (2d ed. 1936). Equity's principal purpose was to expand the arsenal of remedies available to rectify the most difficult and complex wrongs. Similarly, from the earliest days of the Republic, the law has sought to provide fair and adequate remedies to those who have suffered unlawful injury. As Chief Justice Marshall declared in *Marbury v. Madison*, 1 Cranch 137, 163 (1803):

> The very essence of civil liberty certainly consists of the right of every individual to claim the protection of the laws, wherever he receives an injury. . . .
>
> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high

---

[10] *United States v. Morgan*, 307 U.S. 183, 191 (1939) (Stone, J.).

> appellation, if the laws furnish no remedy for the violation of a vested legal right.

This Court has since consistently held that

> where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. *Bell v. Hood*, 327 U.S. 678, 684 (1946).

Although the principle of "complete relief" is frequently cast in terms of equitable discretion, this Court's decisions make clear that, "at least absent congressional restrictions, the scope of equitable remedial powers is to be determined according to the distinctive historical traditions of equity as an institution."[11] In a wide variety of situations unrelated to racial discrimination, this Court has sought to provide full and effective remedies for violations of constitutionally and congressionally declared rights, even where the applicable statutes simply confer general discretion to provide relief, are silent as to personal remedies, or are silent even as to the existence of private causes of action. *See, e.g., Bivens v. Six Unknown Named Agents, supra; J. I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Mitchell v. De Mario Jewelry*, 361 U.S. 288 (1960); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946); *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515 (1937). *Cf. Moragne v. States Marine Lines*, 397 U.S. 375 (1970).

---

[11] *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 404 (1971) (Harlan, J. concurring).

Underlying these and similar decisions[12] is a strong desire "to accord full justice to all the real parties in interest. . . ." *Porter v. Warner Holding Co., supra*, 328 U.S. at 398. Where a congressional policy or the public interest is involved, discretion must be exercised in a manner that fulfills the relevant policy or interest, for "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *J. I. Case Co. v. Borak, supra*, 377 U.S. at 428. *See also Mitchell v. De Mario Jewelry, supra*, 361 U.S. at 291-92; *Textile Workers Union v. Lincoln Mills, supra*, 353 U.S. at 457; *Porter v. Warner Holding Co., supra*, 328 U.S. at 398; *Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944); *United States v. Morgan*, 397 U.S. 183 (1939); *Virginian Ry. Co. v. System Federation No. 40, supra*, 300 U.S. at 552.

It is clear that "traditional equitable discretion" means a duty to provide total relief in accordance with the nature of the wrong and the public policies to be served. The flexibility inherent in equity is designed to permit the courts to make the injured party whole, not just half whole.[13] Relief must be complete, timely and effective. In

[12] Although some of the decisions referred to authorize legal as opposed to equitable remedies, their rationale is not meaningfully different from that which supports those cases more clearly of an equitable nature. As described by Justice Harlan, concurring, in *Bivens, supra*,

> The notion of "implying" a remedy, therefore, as applied to cases like *Borak*, can only refer to a process whereby the federal judiciary exercises a choice among *traditionally available* judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law. 403 U.S. at 402 n.4 (emphasis in original). *See also id.* at 405-406.

[13] Indeed, with the merger of law and equity in the federal system in 1938, federal district courts, in striving for complete justice, are empowered to grant both legal and equitable remedies. *See* note 12, *supra*. *Compare Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944) *with Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944).

antitrust litigation, for example, relief is adequate only if it restores the situation as nearly as possible to that which would have existed but for the unlawful conduct. "The relief . . . must be 'effective to redress the violations' and 'to restore competition.' " *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972). While trial courts in such cases "are invested with large discretion to model their judgments to fit the exigencies of the particular case,"[14] they have "the duty to compel action . . . that will, so far as practicable, cure the ill effects of the illegal conduct. . . ." *United States v. United States Gypsum Co.* 340 U.S. 76, 88 (1950).[15] *See also United States v. Du Pont & Co.*, 366 U.S. 316 (1961).

The application of these principles has not been limited to antitrust cases. Any contention that appellate courts are without power to designate both the direction and the extent of the trial court's discretion is without foundation. In a wide variety of situations, this Court has not hesitated to define the limits within which district courts must exercise their discretion. In *Mitchell v. DeMario Jewelry, supra*, for example, the Court concluded:

> because of what we have found to be the statutory purposes there is doubtless little room for the

---

[14] *International Salt Co. v. United States*, 332 U.S. 392, 401-02 (1947).

[15] With regard to the trial court's discretion, the Court said that "we have never treated that power as one of discretion, subject only to reversal for gross abuse. Rather we have felt an obligation to intervene in this most significant phase of the case when we concluded there were inappropriate provisions in the decree." 340 U.S. at 89.

> exercise of discretion not to order reimbursement. . . . 361 U.S. at 296.[16]

The Court merely does its duty when it provides such guidelines. Appellate guidance is required by, and is not hostile to, the discretion defined in such cases as *Langnes v. Green*, 282 U.S. 531 (1931), and *Hecht Co. v. Bowles, supra.*

This Court has closely scrutinized any claim that the victims of unlawful conduct should not be restored to the position they would have otherwise occupied. For example, the Court has directed that "if necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced," *Porter v. Warner Holding Co., supra*, 328 U.S. at 398, and it has refused to deny relief because of the difficulties in ascertaining the value of the injuries or the exact extent of appropriate relief. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.* 282 U.S. 555, 563 (1931). The Court has unequivocally refused to limit the available remedies "to prospective relief." *J. I. Case Co. v. Borak, supra*, 377 U.S. at 434. Instead, it has followed the principle announced by Justice Cardozo:

> Once let it be ascertained that the amount is determinable, and all that follows is an incident. . . . [O]nce a wrong is brought to light[,] [t]here can be no stopping after that until justice has been done.

---

[16] This Court in *Mitchell* rejected an argument similar to that advanced by petitioners here:

> Respondents cannot be heard to assert that wages are ordered to be paid for services which were not performed, for it was the employer's own unlawful conduct which deprived the employees of the opportunity to render services. 361 U.S. at 293.

Bemis Bros. Bag Co. v. United States, 289 U.S. 28, 35-36 (1933).

In short,

> The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed. *Wicker v. Hoppock*, 6 Wall. (U.S.) 94, 98 (1867).

This "general rule" must govern this and other employment discrimination cases, unless there are compelling reasons for a contrary result, or unless there is "a clear and valid legislative command"[17] requiring only partial vindication of the rights involved.

B. The "Complete Justice" Principle Is Equally Applicable in Race Discrimination Cases.

In *Steele v. Louisville & Nashville R.R. Co., supra.*, this Court inferred from the Railway Labor Act both a right of black employees to be free of racial discrimination in the collective bargaining process and an equitable remedy which federal courts have the "duty to give in cases in which they have jurisdiction." *Id.* at 207. At the same time, the Court inferred a right to relief in the form of money damages. *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944).

---

[17] *Porter v. Warner Holding Co., supra*, 328 U.S. at 398. Similarly, the Court has emphasized that:

> Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. "The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction." Brown v. Swann, 10 Pet. (U.S.) 497, 403 (1836) *Id.*

Even in remedying the seemingly intractable problems relating to racial segregation in the public schools,[18] the Court has followed the same rule – that the goal "of a district court's equitable powers [is] to remedy past wrongs. . . ." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971). "As with any equity case, the nature of the violation determines the scope of the remedy." *Id.* at 16.[19]

This Court has been equally concerned to insure complete justice in connection with less complex forms of racial discrimination. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), a case involving private housing

[18] As it has turned out, the tangible aspects of segregated schooling (e.g., racially identifiable schools) have generally not proved to be intractable. But the imperceptible human harm occasioned by racial discrimination (in employment as well as in education) is not readily susceptible to immediate judicial cure. This is a necessarily tolerated imperfection in the law's remedial capacity. What cannot be tolerated, however, is the failure to rectify promptly the relatively obvious results of disparate treatment, such as unequal job assignments and lost wages. Such relief is fairly simple compared, for example, to the complex problems of restoring a competitive economic market that would have existed but for antitrust violations. Although the Company petitioner appears to suggest that back pay is so difficult to compute that the federal courts should not be imposed upon for such relief (Company Brief at 59), the Union readily concedes that "the Federal district court bench has for many years been engaged in fashioning remedies for infringement of legal rights in a variety of complex fields, so that the ramifications of Title VII actions are hardly so exceptional as to strain its capacity." (Union Brief at 26).

[19] *See also Wright v. Council of the City of Emporia*, 407 451, 463 (1972) ("a court supervising the process of desegregation [must] exercise its remedial discretion responsibly" in light of the established objective); *Davis v. Board of School Comm'rs*, 402 U.S. 33, 37 (1971) ("The measure of any desegregation plan is its effectiveness"); *Green v. County School Bd.*, 391 U.S. 430, 438 (1968) (a district court's discretion must be exercised so as to result in school systems "in which racial discrimination would be eliminated root and branch").

discrimination made unlawful by the Civil Rights Act of 1866, the Court said:

> The fact that 42 U.S.C. §1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a federal court from fashioning an effective remedy. *Id.* at 414, n. 13.[20]

Similarly, in a voting rights case, the Court has emphasized that complete justice is the objective:

> We bear in mind that the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

Finally, even where Congress has spoken on the question of relief in traditional discretionary terms, this Court has required the district courts to exercise their discretion in such a manner as to grant, rather than to withhold, the authorized relief. Thus, in construing Section 204(b) of Title II of the Civil Rights Act of 1964, under which "the court, in its discretion, may allow the prevailing party . . . a reasonable attorneys' fee,"[21] the Court has

---

[20] In *Jones* the Court did not decide whether the available remedy could include monetary relief, because it was satisfied that the plaintiffs would be made whole by an injunction enabling them "to purchase a home . . . at the price prevailing at the time of the wrongful refusal [to sell] . . .," thereby putting them in a position in which they would not "have suffered any uncompensated injury. . . ." *Id.* at 414 n.14. Relying on established remedial principles and the congressional directive contained in 42 U.S.C. §1988, the Court subsequently held that monetary relief was also available to make whole those injured by violations of 42 U.S.C. §1982. "The existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan v. Little Hunting Park*, 396 U.S. 229, 239 (1969).

[21] 42 U.S.C. §2000a-3(b).

held that a successful plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968). The *Newman* definition of discretion—tempered as it is by the overriding concern for justice, including the prohibition of fee awards which would be "unjust" to the losing defendant—is fully consistent with the traditional principles discussed above. Moreover, the Court has applied the *Newman* standard to Section 718 of the Emergency School Aid Act of 1972,[22] observing that "[t]he similarity of language in §718 and §204(b) is, of course, a strong indication that the two statutes should be interpreted pari passu." *Northcross v. Board of Educ.*, 412 U.S. 427, 428 (1973).[23]

In sum, it is rudimentary that an injured party must be placed as nearly as possible in the position he would have

---

[22] 20 U.S.C. §1617 provides that "the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." This statute, like that involved in *Newman*, is couched in traditional discretionary language, described by the Court as "grant[ing] authority to a federal court to award a reasonable attorney's fee when appropriate in a school desegregation case." *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 709 (1974).

[23] It is not a sufficient distinction of *Newman* and *Northcross* to say, as petitioners seek to do, that attorneys' fees are different from back pay. To be sure, there are differences, not the least of which is the fact that attorneys' fees go to lawyers while back pay is received by those who have directly suffered loss as a result of discriminatory practices – a distinction which should favor back pay. But the true importance of *Newman* and *Northcross* is that they establish a standard for exercising discretion which is consonant with the goal of justice.

attained but for the unlawful conduct. This well-settled principle has been strictly applied in the national endeavor to cure the evils of racial discrimination. Only in the most compelling of circumstances may full justice be compromised. The public properly expects that the courts will provide relief commensurate with the legal wrong. "It is the exceptional denial of recovery that disturbs these expectations." *Moragne v. State Marine Lines, supra,* 398 U.S. at 404. Such expectations will be frustrated and the national policy against discrimination will be impeded by "adherence to a rule unjustified in reason, which produces different results for breaches of duty in situations that cannot be differentiated in policy." *Id.* at 405.

This Court has uniformly imposed standards for the granting of relief to insure that an injured party will be made whole. Such standards have been adopted where Congress has created rights and simply conferred federal court jurisdiction to grant "discretionary" relief, where Congress has created rights but has remained silent regarding the question of private remedies, and where the rights stem from the Constitution and Congress has failed to authorize any remedies. Such a standard of "complete justice" is imperative here and in similar cases, unless Congress has dictated less by "a clear and valid legislative command."[24] To that consideration we now turn.

---

[24] *Porter v. Warner Holding Co., supra,* 328 U.S. at 398. Since we conclude below that Congress has not commanded less than full relief from violations of Title VII, which operates to implement the Thirteenth and Fourteenth Amendments, we find it unnecessary to consider whether Congress could constitutionally insist on less effective remedies.

III.

NEITHER THE LANGUAGE NOR THE BACKGROUND OF THE STATUTE SUPPORT AN INFERENCE THAT CONGRESS INTENDED TO PROVIDE TITLE VII PLAINTIFFS WITH LESS THAN A FULL MEASURE OF RELIEF.

Section 706(g) of Title VII authorizes a district court, in response to unlawful employment practices, both to enjoin such practices and to "order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay. . . ." 42 U.S.C. §2000e-5(g). This open-ended remedial authorization obviously does not evidence "a clear and valid legislative command," or even "a necessary and inescapable inference" (*see* note 17, *supra*), that less than complete justice should be permitted. If it were nonetheless thought necessary to look beyond the plain words of the statute, only confirmation of the obvious is found: Congress intended that those subjected to employment discrimination should receive full restitution for their injuries. The legislative history surrounding the 1972 amendments to Title VII demonstrates that the only "clear and valid legislative command" is to make whole the prevailing plaintiffs.[25]

---

[25] For example, the legislative history indicates unequivocally that:

> The provisions of this subsection [Section 706(g)] are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g), the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful practice complained of, *but also requires that persons aggrieved by the consequences and effects of the un-*

[footnote continued]

Additional evidence of Congress' purposes may be obtained from the National Labor Relations Act, 20 U.S.C. §160, upon which Section 706(g) was expressly modeled.[26] The NLRA has been interpreted from the earliest administrative[27] and judicial decisions to require full restitutionary relief. It is now well-settled that "the finding of an unfair labor practice is presumptive proof that some back pay is owed by the employer." *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 178 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966).[28] The controlling consideration is that relief in the form of back wages is necessary to restore the just economic status quo ante

---

lawful practices be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination. 118 Cong. Rec. 7168 (1972) (Section-by-Section Analysis of House-Senate Conferees); *id.* at 3460-3463. *See also* 113 Cong. Rec. 2298-2302, 1861-1864. (emphasis added).

Congress was apparently referring to decisions such as *Robinson v. Lorillard Co.*, 444 F.2d 791 (4th Cir. 1971); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969).

[26] *See, e.g.*, 110 Cong. Rec. 7212-15, 6549 (1964).

[27] The National Labor Relations Board's first published order awarded back pay. *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, 51 (1935), *enf'd sub nom NLRB v. Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1938).

[28] Reinstatement, including other affirmative relief required to make the employee whole, is also presumptive. *Cf. NLRB v. H.N. Thayer Corp.* 213 F.2d 748 (1st Cir. 1954), *cert. denied*, 348 U.S. 883 (1954); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). The Court has, however, acknowledged that in very unusual circumstances the Board may deny reinstatement of a discharged employee, such as where an individual seeks reemployment after offering his services as a labor spy. *Id.* at 195. *Cf. McDonell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

and to "make employees whole for losses suffered." *Nathanson v. NLRB*, 344 U. S. 25, 27 (1952).[29]

Similarly, the Fair Labor Standards Act, 20 U.S.C. §217, has been construed to require a comprehensive remedy, including restitution of wages unlawfully withheld by the employer. *Mitchell v. DeMario Jewelry, supra; Shultz v. Mistletoe Express Service, Inc.*, 434 F.2d 1267 (10th Cir. 1970); *Shultz v. Parke*, 413 F.2d 1364 (5th Cir. 1969); *Wirtz v. Malthor, Inc.*, 391 F.2d 1 (9th Cir. 1968); *Wirtz v. Atlas Roofing Mfg. Co.*, 377 F.2d 112 (5th Cir. 1967). The discretionary standard adopted by the Court of Appeals in this case is similar to that stated by Justice Harlan for this Court in *Mitchell v. DeMario Jewelry, supra*. Here, as there, there should be "little room for the exercise of discretion not to order reimbursement." 361 U.S. at 296.

The legislative policy of Title VII is thus the antithesis of "a clear and valid legislative command" that the courts should make less than whole those who are injured by unlawful employment practices. The traditional principles discussed above in Part II, as well as those developed under the NLRA and the FLSA, demand the adoption of a rule for Title VII requiring back-pay awards unless such awards would constitute manifest injustice to the defendants.[30]

---

[29] *Accord, Phelps Dodge v. NLRB, supra*, 313 U.S. at 194; *NLRB v. Pennsylvania Greyhound Lines, Inc., supra,; NLRB v. Mastro Plastics Corp., supra; NLRB v. Rutter Rex Mfg. Co.*, 396 U.S. 258, 263 (1969). *See also Golden State Bottling Co. v. NLRB*, 414 U.S. 160, 176 (1974).

[30] The lower courts have generally reached a similar conclusion. *See, e.g., Robinson v. Lorillard Corp., supra; Head v. Timken Roller Bearing Co.*, 486 F.2d 870 (6th Cir. 1973); *Meadows v.*

[footnote continued]

IV.

BACK PAY IS ESSENTIAL TO EFFECTIVE ENFORCEMENT OF TITLE VII; THE SPECIAL CIRCUMSTANCES WHICH MIGHT JUSTIFY MORE LIMITED RELIEF MUST BE NARROWLY CIRCUMSCRIBED.

As we have demonstrated above, the award of back pay for wages lost as a result of unlawful conduct is an integral part of the complete relief required by both established doctrine and Title VII. Contrary to petitioners' claims (Company Brief at 60; Union Brief at 33), adherence to the principle of complete relief in this case will also substantially assist in making Title VII work[31] to eliminate employment discrimination. Once wrongdoers realize that they cannot escape restitution for their unlawful acts, the incentive to reform voluntarily increases dramatically.[32] As the Court has stated in another context:

Ford Motor Co., ___ F.2d___, 9 FEP Cases 180 (6th Cir. 1975); *Duhon v. Goodyear Tire & Rubber Co.*, 494 F.2d 817 (5th Cir. 1974); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974); *Bowe v. Colgate-Palmolive Co., supra; Johnson v. Georgia Highway Express Co.*, 417 F.2d 1122 (5th Cir. 1969); *U.S. v. Masonry Contractors*, 494 F.2d 870 (6th Cir. 1974); *United States v. Georgia Power Co.*, 474 F.2d 906 (5th Cir. 1973).

[31] See *Culpepper v. Reynolds Metals Co., supra*, 421 F.2d at 891.

[32] Petitioners argue that only those class members that have filed charges with the Equal Employment Opportunity Commission should be entitled to back-pay relief. The effect of this approach would be to render the provision of Rule 23 of the Federal Rules of Civil Procedure a nullity and to treat Title VII actions as a joinder of individual claims. The practical effect would be a deluge of identical charges to the EEOC for practices that an employer has repeatedly refused to eliminate voluntarily. Furthermore, each of those charges would ultimately

[footnote continued]

> The confidence of people in their ability to predict the legal consequences of their actions is vitally necessary to facilitate the planning of primary activity and to encourage the settlement of disputes without resort to the courts. *Moragne v. States Marine Lines, supra,* 398 U.S. at 403.

An example of the effectiveness of voluntary compliance where an agency operates under the "complete relief" standard is the Department of Labor's administrative enforcement of the Fair Labor Standards Act. In fiscal year 1974 the Department found violations of the Act's minimum wage, overtime and equal pay requirements affecting 341,000 workers. Employers then voluntarily made restitution to 263,000 of these workers—73 percent of the total.[33] In contrast, the Equal Employment Opportunity Commission, with the same enforcement authority but without a clear judicial standard from this Court with respect to back-pay awards, was able to muster only 2,279 successful conciliations out of a

---

result in a separate lawsuit, thereby inundating the courts with tens of thousands of individual claims for relief. The petitioners' position has been repeatedly rejected by both the lower courts and Congress. *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, (5th Cir. 1968); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969). An amendment offered by Senator Hruska that would have required the filing of charges as a pre-condition to relief under Title VII was defeated. *Legislative History of the Equal Employment Opportunity Act of 1972*, 92d Cong., 2d Sess. at 1406, 1407 (Comm. Print. 1972).

[33] Minimum Wage and Maximum Hours Standards Under the Fair Labor Standards Act, U.S. Department of Labor Employment Standards Administration, An Economics Effect Study Submitted to Congress, 13-14 (1975).

pending-charge load of 80,516 in fiscal year 1973—or less than 3 percent.[34]

The award of back pay absent special circumstances will serve the overriding purpose of Title VII of the Act—prompt and complete elimination of employment discrimination and its effects. This Court should not limit back-pay relief except where such relief would be demonstrably unjust to the wrongdoer. Just what such circumstances would be must, of course, be determined on a case-by-case basis.[35] It is clear, however, that the two factors relied upon by the trial court are inappropriate.

First, the trial court found that petitioners had not engaged in their unlawful practices out of "bad faith." This Court has, however, already determined that the elusive concept of "good faith" does not exempt a violator from the remedial sanctions of Title VII,[36] any more than it can justify the maintenance of segregated parks[37] or segregated schools.[38] *Cf. Consolo v. Federal*

[34] Hearings on H.R. 15826 before the Subcommittee on Equal Opportunities of the House Committee on Education and Labor, 93d Cong., 2d Sess., 279, 290 (1975).

[35] The lower courts have indicated that such circumstances may be incurred where the employer discriminated because of the compulsion of state laws deemed at the time to be valid. *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002 (9th Cir. 1972); *Kober v. Westinghouse*, 480 F.2d 240 (3d Cir. 1973); *Manning v. General Motors Co.*, 466 F.2d 812 (6th Cir. 1972); *LeBlanc v. Southern Bell Co.*, 466 F.2d 1228 (5th Cir.) *cert. denied*, 409 U.S. 990 (1972). Such circumstances also might be present in those situations described in 42 U.S.C. §2000e-12(b), where a defendant has relied on an opinion, written interpretation or instruction of the EEOC.

[36] *Griggs v. Duke Power Co., supra*, 401 U.S. at 431.

[37] *Watson v. City of Memphis, supra*, 373 U.S. at 535.

[38] *Wright v. Council of City of Emporia, supra*, 407 U.S. at 461-62.

Maritime Comm'n, 383 U.S. 607, 624-25 (1966). A "good faith" standard is particularly inappropriate in connection with relief in employment discrimination cases. The goal of Title VII is to eradicate discrimination and to make whole its victims. The object of back pay is restitution to the employee, not a penalty against the employer. If a good faith issue were injected as a standard governing relief, the focus of the litigation would be diverted from the real goal by requiring the trial court to referee an otherwise irrelevant name-calling contest among the litigants. Moreover, as with legislative enactments, "it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind . . . [an employment practice]." *Palmer v. Thompson*, 403 U.S. 217, 224 (1971). The law's general preference for objective standards has particular relevance here, where the restitution is directed at making the victim whole, rather than penalizing the wrongdoer.

The district court's second reason for denying back pay is related to petitioners' claim that, notwithstanding the clear authority of Section 706(g), they were not put on notice that back pay was an issue until approximately a year prior to trial. This reason is legally insufficient, for it has long been the rule "that at a trial upon the merits the suitor shall have the relief appropriate to the facts that he has pleaded, whether he had prayed for it or not. *Cf.* Equity Rules 19 and 22." *Bemis Bros. Bag. Co. v. United States, supra,* 289 U.S. at 34 (Cardozo, J.).[39]

---

[39] *See* Rule 54(c), Fed. R. Civ. P. Pecuniary relief has frequently been granted long after suit has been filed. *Columbia Nastic & Carter Caibone v. Columbia R. & C. Mfg. Co.*, 367 F.2d 308, 312 (2d Cir. 1966); *Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co.*, 255 F.2d 518, 522-23 (3d Cir. 1958), *cert. denied*, 358 U.S. 831 (1958); *Kansas City-St. Louis*

[footnote continued]

Further, "it has never been the law that a litigant is absolved from liability for that time during which his litigation is pending." *Consolo v. Federal Maritime Comm'n, supra,* 383 U.S. at 624-25.

Title VII can work, and the purposes of Congress achieved, only if the justifications used to support a denial of back pay are far more compelling than those relied upon by the trial court in this case. Such justifications should involve unequivocal evidence of manifest injustice to defendants. Any less rigorous standard would defeat the national policies reflected in Title VII.

CONCLUSION

As shown above, the result reached and the standard applied by the Court of Appeals are in complete harmony with well-settled equitable and legal principles. The court's result and standard are required by those principles, absent legislation clearly mandating a less complete remedy. There is no such legislative command. To the contrary, the legislative directive here is to restore those injured by illegal racial discrimination to a status as near as possible to that which they would have obtained but for an accident of birth. It is not possible, of course, to make truly whole those who have suffered and who continue to suffer from the lingering vestiges of slavery. The injury to "their hearts and minds" is "unlikely ever

---

& C.R. Co. v. Alton R. Co., 124 F.2d 780, 783 (7th Cir. 1941). In a factual situation virtually identical to this case, the Court awarded back pay, even though the Plaintiffs had not requested this remedy until after the commencement of trial. *Robinson v. Lorillard Co., supra. Cf. NLRB v. Rutter Rex Mfg. Co., supra* 396 U.S. at 164 (Lengthy delays by the NLRB, insufficient to limit an award of back pay).

to be undone." *Brown v. Board of Educ., supra,* 347 U.S. at 494. But the law at least requires vigorous judicial efforts to provide complete justice. Such a result has been equity's historic task. It reflects an overriding remedial principle that remains viable and that was fully adhered to by the Court of Appeals. It should again receive this Court's imprimatur.

Respectfully submitted,

RICHARD F. BABCOCK
WILLIAM H. BROWN, III
LLOYD N. CUTLER
ERWIN D. GRISWOLD
Lawyers Committee For Civil Rights Under Law

J. HAROLD FLANNERY
PAUL R. DIMOND
WILLIAM E. CALDWELL
LINDA E. PERLE
ROBERT B. WALLACE
520 Woodward Building
Washington, D.C. 20005

Attorneys for Amicus Curiae.